



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Order 2007-10-36

Issued by the Department of Transportation
on the 26th day of October, 2007

Served: October 26, 2007

Application of

CHALLENGE-AIR LUFTVERKEHRS GMBH

Docket DOT-OST-2001-11058

for an exemption under 49 U.S.C. §40109 and a foreign
air carrier permit under 49 U.S.C. §41301

ORDER GRANTING EXEMPTION AND TO SHOW CAUSE

Summary

By this order we (1) grant the application of the referenced foreign air carrier for an exemption under 49 U.S.C. §40109, subject to conditions;¹ and (2) tentatively find that it is in the public interest to grant the applicant the foreign air carrier permit attached as Appendix B to this order.

Background

By Notice dated May 3, 2007, we invited foreign air carriers of the European Union (EU) to apply for Department economic authority to conduct operations to and from the United States under the recently-signed U.S.-EU Air Transport Agreement. In that Notice, we stated that we anticipated handling these EU carrier requests on an expedited basis to ensure that affected EU carriers may receive the authority available to them under the new Agreement as quickly as possible. To that end, we stated our intent to process requests for this authority under the "streamlining" procedures set out in our August 23, 2005 Notice in Docket DOT-OST-2005-22228, in which we announced several steps designed to simplify our regulatory procedures for licensing foreign (and U.S.) air carriers. Our action in this Order serves to implement those streamlined regulatory procedures for the application involved in this proceeding.

¹ The conditions are attached as Appendix A.

Applications

By application filed November 27, 2001, as supplemented March 10, 2004, and August 1, 2007, Challenge-Air Luftverkehrs GmbH (Challenge-Air), a foreign air carrier of Germany, requests expanded exemption authority under 49 U.S.C. §40109,² and a foreign air carrier permit under 49 U.S.C. §41301,³ using small aircraft, to engage in:

- a. charter foreign air transportation of persons, property, and mail from any point or points behind any Member State of the European Union, via any point or points in any EU Member State and via intermediate points to any point or points in the United States and beyond;
- b. charter foreign air transportation of persons, property, and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area (ECAA);
- c. charter foreign air transportation of cargo between any point or points in the United States and any other point or points;
- d. other charters (between non-EU/ECAA third countries and the United States, and otherwise) in accordance with 14 CFR Part 212; and
- e. charter transportation authorized by any additional route rights made available to European Community carriers in the future.

Challenge-Air requests that the Department proceed directly to a final order issuing it a foreign air carrier permit, as it was recently found fit by the Department when its existing exemption authority was renewed earlier this year.

The applicant provided evidentiary materials required by 14 CFR Part 211 of our regulations to support its requests for authority.

² Challenge-Air currently holds exemption authority, most recently renewed by Notice of Action Taken dated April 26, 2007, in Docket DOT-OST-2001-11057, to conduct charter foreign air transportation of persons, property, and mail using small aircraft, between any point or points in Germany and any point or points in the United States; between any point or points in the United States and any point or points in a third country or countries, provided that, except with respect to cargo charters, such charter traffic is carried on a flight that serves Germany for purposes of carrying traffic between the United States and Germany; and other charters in accordance with 14 CFR Part 212.

³ Challenge-Air's original request in this Docket was for a foreign air carrier permit to conduct various operations under the U.S.-Germany Agreement. By its August 2007 Supplement, the applicant modified its request to now seek additional exemption authority, as well as a foreign air carrier permit, for broad authority under the U.S.-EU Agreement.

No answers were filed to the August 2007 Supplement of Challenge-Air seeking to broaden its request in this Docket.⁴

Decision

We have decided, consistent with our August 23, 2005 Notice referenced above, to grant the applicant's request for exemption authority, as described below and subject to conditions, and tentatively to grant, subject to show-cause procedures, its request for a foreign air carrier permit, also subject to conditions.⁵

Specifically, we will grant Challenge-Air exemption authority to the extent necessary to permit it (1) immediately to accept payment, issue tickets, and enter into charter contracts, and (2) effective March 30, 2008 (the date for provisional application of the U.S.-EU Agreement), to commence flight operations, for the services set forth in ordering paragraph 1 below.⁶ We will tentatively grant Challenge-Air a foreign air carrier permit for these services, to be effective March 30, 2008.

As an additional matter, Challenge-Air has requested that we grant it, in addition to authority currently contained in the U.S.-EU Agreement, authority to conduct "charter transportation authorized by any additional route rights made available to European Community carriers in the future." We are granting Challenge Air's request for this authority by exemption (and tentatively granting it by foreign air carrier permit). We are, however, requiring Challenge-Air, before it commences any new service under this authority, to provide us with evidence that it holds a homeland license for that new service, unless it has already provided such evidence.⁷

With respect to the applicant's request for exemption authority, we find that grant of this authority, as conditioned, is consistent with the public interest. We also find that the applicant is financially and operationally qualified to perform the services authorized,⁸ and that it is

⁴ On December 20, 2001, United Parcel Service Co. filed an answer opposing Challenge-Air's initial foreign air carrier permit application due to a trade name concern. We addressed that issue in our initial grant of exemption authority to Challenge-Air. (See Notice of Action Taken dated March 29, 2002, in Docket DOT-OST-2001-11057.)

⁵ We note that Challenge-Air requested that we proceed directly to a final order awarding its foreign air carrier permit. Under the circumstances presented, we have decided to proceed under show-cause procedures, consistent with our earlier actions in awarding amended authority to other EU carriers under the new U.S.-EU Agreement.

⁶ Our action allowing Challenge-Air to accept payments, issue tickets, and enter into charter contracts now, in anticipation of the effective date of the U.S.-EU Agreement, will place the carrier on an equal footing with U.S. carriers holding blanket Open Skies authority, which we have allowed to accept payments and issue tickets for services to points in the European Union. See Notice dated May 1, 2007, "In the Matter of Blanket Open-Skies Certificate Authority." See also Orders 2007-8-31 and 2007-8-32, where we granted this authority to Zoom Airlines Limited and Amira Air GmbH, respectively.

⁷ See Orders 2007-10-1 and 2007-10-16, where we granted this authority to British Airways Plc and Virgin Atlantic Airways, Ltd., respectively.

⁸ The applicant has requested confidential treatment of its financial submissions, under the provisions of 14 CFR §302.12. Good cause having been shown, we will grant this request.

substantially owned and effectively controlled by citizens of its homeland.⁹ We also find that the authority sought by the applicant is encompassed by the U.S.-EU Air Transport Agreement, for flight operations commencing March 30, 2008.

Further, we note that the applicant is properly licensed by its homeland to perform the proposed services. In addition, by memorandum dated August 15, 2007, the Federal Aviation Administration advised us that it knew of no reason why we should act unfavorably on the applicant's requests. We have verified the applicant's compliance with 14 CFR Parts 203 (Warsaw liability waiver), and 205 (insurance requirements).

In view of the above, we find that grant of the requested exemption authority, as conditioned, for a two-year term, or until the requested permit authority becomes effective, whichever occurs earlier, is warranted.

Tentative Findings and Conclusions--Foreign Air Carrier Permit Application

We tentatively find and conclude that the public interest warrants granting the applicant a foreign air carrier permit, in the form attached as Appendix B and subject to the conditions attached.¹⁰ In particular, we tentatively find and conclude that the factors which support our grant of exemption authority to the applicant, as discussed above, also warrant granting the applicant the foreign air carrier permit it seeks.

In view of the foregoing and all facts of record, and acting under authority assigned by the Department in its regulations, 14 CFR Part 385, we tentatively find and conclude that:

1. It is in the public interest to issue the applicant a foreign air carrier permit in the form attached, for operations with small aircraft, effective March 30, 2008 (the date for provisional application of the U.S.-EU Agreement);¹¹
2. The applicant is fit, willing and able properly to perform the foreign air transportation described in the attached permit and to conform to the provisions of Title 49 of the U.S. Code, and to our rules, regulations, and requirements;
3. The applicant is substantially owned and effectively controlled by citizens of its claimed homeland;

⁹ Challenge-Air states that it remains wholly owned by citizens of Germany as outlined in its original permit and exemption applications. Challenge-Air further states that its President and the majority of its key management personnel are also citizens of Germany.

¹⁰ The applicant's request for a foreign air carrier permit was summarized in the Department's published weekly list of applications filed. This notice described the authority sought and gave interested persons an opportunity to submit evidence and objections to the award of this foreign air carrier permit authority.

¹¹ In its application, the applicant specifically stated that it was applying to provide the services requested using small aircraft.

4. The public interest requires that the exercise of the privileges granted by the permit should be subject to the terms, conditions, and limitations contained in the attached permit, and to such other reasonable terms, conditions, and limitations required by the public interest as we may prescribe;

5. The issuance of this foreign air carrier permit will not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975, as defined in 14 CFR §313.4(a)(1) of our regulations;¹²

6. The public interest does not require an oral evidentiary hearing on the application; and

7. Our action with respect to this foreign air carrier permit should, unless disapproved by the President of the United States under §41307 of Title 49 of the U.S. Code, become effective on the 61st day after its submission for §41307 review, or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove this portion of the Department's decision under that section, whichever occurs earlier.

In view of the above, and acting under authority assigned by the Department in its regulations, 14 CFR Part 385, we find that (1) our actions are consistent with Department policy; and (2) with respect to the exemption authority we are conferring on the applicant, the applicant is qualified to perform those operations; and that grant of the exemption authority is consistent with the public interest and would not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975.

ACCORDINGLY,

1. We grant the request of Challenge-Air Luftverkehrs GmbH for an exemption under 49 U.S.C. §40109 to permit it (1) effective on the issue date of this order, to accept payment, issue tickets, and enter into charter contracts, and (2) effective March 30, 2008, to commence flight operations, for the services set forth below:

- a. foreign charter air transportation of persons, property, and mail from any point or points behind any Member State of the European Union, via any point or points in any Member State and via intermediate points to any point or points in the United States and beyond;
- b. foreign charter air transportation of persons, property, and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area;

¹² This finding is based on the fact that the grant of this permit will not result in a near-term net annual change in aircraft fuel consumption of 10 million gallons or more.

- c. foreign charter cargo air transportation between any point or points in the United States and any other point or points;
 - d. other charters pursuant to the prior approval requirements set forth in 14 CFR Part 212 of the Department's regulations; and
 - e. transportation authorized by any additional route rights made available to European Community carriers in the future;
2. In the conduct of these operations, Challenge-Air Luftverkehrs GmbH may only use aircraft capable of carrying no more than 60 passengers and having a maximum payload capacity of no more than 18,000 pounds;
 3. Challenge-Air Luftverkehrs GmbH shall, before it commences any new service under subparagraph (e) of ordering paragraph 1 above, provide the Department, in Docket DOT-OST-2001-11058, with evidence that it holds a homeland license for that new service, unless it has already provided such evidence to the Department;
 4. The exercise of the privileges granted above is subject to compliance by Challenge-Air Luftverkehrs GmbH with the conditions listed in Appendix A;
 5. We grant the request of Challenge-Air Luftverkehrs GmbH for confidential treatment of its financial submissions, consistent with the provisions of 14 CFR §302.12;
 6. Our action granting the exemption authority described herein, subject to the provisions of ordering paragraph 1 above, is effective immediately, for a period of two years from the issue date of this order, or until the attached permit becomes effective, whichever is earlier;
 7. We may amend, modify, or revoke the exemption authority set forth herein at our discretion at any time and without hearing;
 8. To the extent not acted upon above, we dismiss all requests for relief in Docket DOT-OST-2001-11058;
 9. With respect to the applicant's request for a foreign air carrier permit in this proceeding, we direct all interested persons to show cause why our tentative decision on that application, set forth above, should not be made final;
 10. Any interested person objecting to the issuance of an order making final our tentative findings and conclusions with respect to the applicant's request for a foreign air carrier permit shall, no later than twenty-one (21) calendar days after the date of service of this order, file with the Department and serve on the parties to this proceeding, a statement of objections specifying the part or parts of the tentative findings and conclusions objected to, together with a summary of testimony, statistical data, and concrete evidence to be relied upon in support of the

objections; if objections are filed, answers to objections are due no later than seven (7) calendar days thereafter;

11. If timely and properly supported objections are filed, we will give further consideration to the matters and issues raised by the objections before we take further action;

12. In the event no objections are filed, all further procedural steps shall be deemed waived, and the Department will enter an order which will (subject to Presidential review under §41307 of Title 49 of the U.S. Code) make final our tentative findings and conclusions set forth in this order; and

13. We will serve a copy of this order on Challenge-Air Luftverkehrs GmbH, United Parcel Service Co., the Embassy of Germany in Washington, D.C., the Department of State, and the Federal Aviation Administration.

By:

PAUL L. GRETCH
Director
Office of International Aviation

(SEAL)

Appendices

*An electronic version of this document is available on the World Wide Web at:
<http://www.regulations.gov>*

Foreign Air Carrier Exemption Conditions

Appendix A

In the conduct of the operations authorized, the foreign carrier applicant shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, the Transportation Security Administration, and with all applicable U.S. Government requirements concerning security, including, but not limited to, 14 CFR Parts 129, 91, and 36 and 49 CFR Part 1546 or 1550, as applicable. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, contact its International Principal Security Inspector (IPSI) to advise the IPSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States. In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;
- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in a Member State of the European Union;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code.

Issued by
Order 2007-



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

PERMIT TO FOREIGN AIR CARRIER

CHALLENGE-AIR LUFTVERKEHRS GMBH

A Foreign Air Carrier of Germany

is authorized, subject to the following provisions, the provisions of Title 49 of the U.S. Code, and the orders, rules, and regulations of the Department of Transportation, to engage in:

Foreign charter air transportation of persons, property, and mail from any point or points behind any Member State of the European Union, via any point or points in any Member State and via intermediate points to any point or points in the United States and beyond;

Foreign charter air transportation of persons, property, and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area;

Foreign charter cargo air transportation between any point or points in the United States and any other point or points;

Other charters pursuant to the prior approval requirements set forth in the Department's regulations governing charters; and

Transportation authorized by any additional route rights made available to European Community carriers in the future; *provided*, that the holder shall, before it commences any new service under such additional route rights, provide the Department with evidence that it holds a homeland license for that new service (unless it has already provided such evidence to the Department). Such evidence shall be filed in Docket DOT-OST-2001-11058.

In the conduct of these operations, the holder may only use aircraft capable of carrying no more than 60 passengers and having a maximum payload capacity of no more than 18,000 pounds.

This permit and the exercise of the privileges granted in it shall be subject to the terms, conditions and limitations in both the order issuing this permit and the attachment to this order, and to all applicable provisions of any treaty, convention or agreement affecting international air

transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the holder's homeland are or shall become parties.

This permit shall be effective on March 30, 2008. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention or agreement, this permit shall terminate (1) upon the dissolution or liquidation of the holder to whom it was issued; (2) upon the effective date of any treaty, convention, or agreement or amendment, which shall have the effect of eliminating the right for the service authorized by this permit from the service which may be operated by airlines of the European Community and its Member States (or, if the right is partially eliminated, then the authority of this permit shall terminate in like part); or (3) upon the termination or expiration of the applicable air services agreement between the United States and the European Community and its Member States. However, clause (3) of this paragraph shall not apply if prior to such termination or expiration, the foreign air transportation authorized herein becomes the subject of another treaty, convention or agreement to which the United States and the European Community and its Member States become parties.

The Department of Transportation has executed this permit and affixed its seal on

By:

PAUL L. GRETCH
Director
Office of International Aviation

(SEAL)

Foreign Air Carrier Permit Conditions

In the conduct of the operations authorized, the foreign carrier applicant shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, the Transportation Security Administration, and with all applicable U.S. Government requirements concerning security, including, but not limited to, 14 CFR Parts 129, 91, and 36 and 49 CFR Part 1546 or 1550, as applicable. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, contact its International Principal Security Inspector (IPSI) to advise the IPSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States. In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;
- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in a Member State of the European Union;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code.